

Date Issued: January 29, 1986 (AGO 86-4)

Requested by: Vernon Fahy, State Engineer
North Dakota State Water Commission

- QUESTIONS PRESENTED -

I.

Whether N.D.C.C. section 61-24.3-03 authorizes the State Water Commission to acquire without compensation a right of way over original school and institutional lands for construction of the Southwest Pipeline Project.

II.

Whether Article IX, Section 6 of the North Dakota Constitution authorizes the State Water Commission to acquire a right of way over original school and institutional lands by private sale.

III.

Whether N.D.C.C. section 61-24.3-03 authorizes the State Water Commission to acquire a right of way without compensation over acquired school or institutional lands for construction of the Southwest Pipeline Project.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that N.D.C.C. section 61-24.3-03 does not authorize the State Water Commission to acquire without compensation a right of way over original school and institutional lands for construction of the Southwest Pipeline Project.

II.

It is my further opinion that Article IX, Section 6 of the North Dakota Constitution authorizes the State Water Commission to acquire a right of way over original school and institutional lands by private sale.

III.

It is my further opinion that N.D.C.C. section 61-24.3-03 does not authorize the State Water Commission to acquire a right of way without compensation over acquired school and institutional lands for construction of the Southwest Pipeline Project.

- ANALYSES -

I.

The State Water Commission of the State of North Dakota is established pursuant to N.D.C.C. chapter 61-02. N.D.C.C. section 61-02-22 grants the State Water Commission the "full power and

authority to acquire by purchase or exchange, . . . and by condemnation, any lands, rights, . . . easements . . . and other property deemed necessary or proper for the construction, operation and maintenance of works." As you advise in your request for an opinion from this office, N.D.C.C. chapter 61-24.3 authorizes the State Water Commission to proceed with the construction of the Southwest Pipeline Project. Your questions arise by reason of N.D.C.C. section 61-24.3-03 which provides that a "right of way is hereby given, dedicated, and set apart, to locate, construct, and maintain such works over and through any of the lands which are or may be the property of the state."

Some of the lands at issue here are among those lands originally granted by the United States to the State of North Dakota in trust for the benefit of the state's schools and certain specified state institutions. The terms under which these lands were granted to the state are set forth in an act passed by the Congress entitled "an >Act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the union on an equal footing with the original states, and to make donations of public lands to such states." 25 Stat. 676 (1889). Enacted on February 22, 1889, the Act is more commonly known in North Dakota as the "Enabling Act." State Highway Commission v. State 297 N.W. 194, 195 (N.D. 1941).

The Enabling Act granted to the State of North Dakota more than three million acres of land (Department of University and School Lands Forty-fifth Biennial Report (1981-83)), and provided that certain formalities be observed by the state in the sale or lease of these lands. North Dakota Enabling Act, Section 11. The state accepted the grant, N.D. Constitution Article XIII, Section 3, and thereby consented and agreed to hold title to these lands as trustee to fulfill the purposes of the grant. State, ex rel., Board of University and School Lands v. McMillan 96 N.W. 310 (N.D. 1903).

The language of the Enabling Act manifests the obvious purpose of the grant and the congressional intent to establish a trust "to be held and administered by the states under trust covenants for the perpetual benefit of the public school systems." Utah v. Kleppe 586 F.2d. 756, 758 (Tenth Cir. 1978) rev'd on other grounds, Andrus v. Utah 446 U.S. 500 (1980). By the terms of the Enabling Act, certain restrictions are placed on the disposition of the lands granted to the state.

Section 11 . . . All lands shall be disposed of only at public sale after advertising - tillable lands . . . for not less than \$10.00 per acre . . .

* * *

The state may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this act, as may be acquired in privately owned lands through proceedings in eminent domain: provided, however, that none of the such lands, nor any estate or interest therein, shall ever be disposed of except in the pursuance of general laws

providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

North Dakota Enabling Act, Section 11.

In acceptance of the terms of the grant, similar terms of the Enabling Act were incorporated in the North Dakota Constitution. Article IX, Section 6 of the North Dakota Constitution prohibits the sale of original grant school or institutional land for less than fair market value and in no case less than ten dollars per acre. This section also provides that all sales of land shall be "at public auction and to the highest bidder," and that:

Any of said lands that may be required for any of the purposes for which private lands may be taken under the right of eminent domain under the constitution and law of this state, may be sold under the provisions of this article, and shall be paid for in full at the time of sale, or at any time thereafter as herein provided.

N.D. Constitution, Article IX, Section 6.

It is eminently clear from the foregoing that the emphasis in both the Enabling Act and the Constitution of North Dakota is that trust lands shall not be disposed of unless the full value of the interests acquired is paid in full to the trust. These lands are to be administered by the state for the sole interest of the trust beneficiaries. State, ex rel., Board of University and School Lands v. McMillan supra. We find nothing in either the Enabling Act or the constitution of this state granting an exception to this protection when trust lands are to be used for a public purpose no matter how meritorious the purpose.

Of course, it naturally follows that any statutory disposition of trust lands which does not provide full compensation to the trust conflicts with both the Enabling Act and the constitution of this state. The provisions of any such statute may, therefore, constitute a violation of the Supremacy Clause of the United States Constitution, U.S. Constitution, Article 6, Cl. 2, and may also be unconstitutional as applied to the provisions of the North Dakota Constitution relating to the disposition of trust lands. N.D. Constitution, Article IX, Section 6. The question, therefore, is whether N.D.C.C. section 61-24.3-03, which grants a right of way over any lands of the state, constitutes a breach of the provisions of the Enabling Act or the North Dakota Constitution.

In construing the constitutionality of any statute, several rules of statutory construction are applicable. N.D.C.C. section 1-02-38 provides that when enacting a statute, it is presumed that the Legislature was intending to comply with the state and federal constitutions. Furthermore, the North Dakota Supreme Court has stated that if a statute is susceptible to two constructions, one which will be compatible with constitutional provisions or one which will render the statute unconstitutional, we must adopt the construction which will make the statute valid. Paluck v. Bd. of

City Com'rs, Stark Cty. 307 N.W.2d. 852, 856 (N.D. 1981). The court has also held that every reasonable presumption is in favor of the constitutionality of a statute, State, et rel., Sathre v. Board of University and School Lands 262 N.W. 60, 64 (N.D. 1935); and, if it is possible to do so, interpretations of statutes which place the statute in disharmony with the constitution are avoided. Grace Lutheran Church v. N.D. Employment Sec. Bureau 294 N.W.2d. 767, 772 (N.D. 1980).

In addition, the court has stated that state statutes should be construed to avoid potential conflicts with the state and federal constitutions. Three Affiliated Tribes v. Wold Engineering 364 N.W.2d. 98, 101 (N.D. 1985). Finally, in Menz v. Coyle 117 N.W.2d. 290, 295 (N.D. 1962) the court held that an act is presumed constitutional and will be upheld unless manifestly contrary to the state or federal constitutions; only when the statute is unconstitutional beyond a reasonable doubt will it be declared void.

These same rules of statutory construction apply when this office is requested to issue an opinion regarding the constitutionality of a law of this state. See generally 1980 N.D. Attorney General's Opinion 67.

In analyzing the provisions of N.D.C.C. section 61-24.3-03 to determine if it conflicts with either the state or federal constitution, we note initially that while the statute specifically states that a right of way over state property is "given, dedicated, and set apart," there is no language in that section which suggests that compensation is not necessary. Since 1915, the Legislature of this state has authorized and provided a method for the disposition of school and institutional lands for public purposes. 1915 N.D. S.L. 242, Section 1 et seq. Currently codified as N.D.C.C. chapter 15-09, that statute provides a mechanism for the purchase of school and institutional land at fair market value in lieu of condemnation. See N.D.C.C. sections 15-09-01, 15-09-02, 15-09-03.

A review of the legislative history of N.D.C.C. section 61-24.3-03 reveals no record of any legislative discussion about the effects of granting a right of way over school and institutional lands. Therefore, in order to determine whether the language contained in N.D.C.C. section 61-24.3-03 is in conflict with N.D.C.C. chapter 15-09, we must look to the rules of interpretation contained in N.D.C.C. section 1-02-07. That statute provides as follows:

1-02-07. PARTICULAR CONTROLS GENERAL. Whenever a general provision in a statute shall be in conflict with a special provision in the same or in another statute, the two shall be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest legislative intent that such general provision shall prevail.

It is my opinion the provisions contained in N.D.C.C. chapter 15-09 are more specific than those contained in N.D.C.C. section 61-24.3-03

and are, therefore, controlling in the event of the conflict. It is my further opinion that the Legislature did not intend the terms "given, dedicated, and set apart" to be construed to mean without compensation and in violation of the Enabling Act and the North Dakota Constitution. Therefore, the State Water Commission must provide full compensation for any original school or institutional lands acquired for the construction of the Southwest Pipeline Project.

II.

As discussed above, N.D.C.C. chapter 15-09 constitutes the legislative enactment authorizing the sales of school and institutional lands in lieu of condemnation. N.D.C.C. section 15-09-01 provides, in part, as follows:

15-09-01. PUBLIC LANDS - APPLICATION TO ACQUIRE FOR PUBLIC OR QUASI-PUBLIC PURPOSE. The state of North Dakota or any person, firm, or public or private corporation, desiring to acquire any school or institution lands for the state for:

1. Townsite purposes;
2. Schoolhouse sites;
3. Church sites;
4. Cemetery sites;
5. Sites for other educational or charitable institutions;
6. Sites for public parks;
7. Sites for fairgrounds;
8. Public highway purposes;
9. Fish hatcheries;
0. Airports;
1. Railroad right of way or other railroad uses and purposes;
2. Reservoirs for the storage of water for irrigation;
3. Drainage ditches;
4. Irrigation ditches; or
5. Any of the other purposes for which the right of eminent domain may be exercised under the constitution and laws of the state,

may make written application to the board of university and school lands therefor. Such application shall state briefly the purposes for which the land is required, describe the land as accurately as practicable, and shall be accompanied by a map

showing the land desired.

* * *

N.D.C.C. section 15-09-02 requires an appraisal of the tract and N.D.C.C. section 15-09-02 requires notice of the application to be published before the date set for hearing. N.D.C.C. section 15-09-03 states that if the Board of University and School Lands determines that the tract described in the application is required for the stated purpose "it shall fix a price, not less than the appraised valuation thereof, at which the conveyance of the entire tract of land will be made voluntarily."

It is apparent from the above that N.D.C.C. chapter 15-09 grants the Board of University and School Lands the authority to conduct private sales in lieu of condemnation if the price affixed for the conveyance is not less than the appraisal thereof. As noted above, however, Article IX, Section 6 of the North Dakota Constitution provides that all sales of school and institutional land shall be "at public auction and to the highest bidder." Unlike the Enabling Act, the state constitution does not expressly exempt the disposition of school and institutional lands through condemnation or proceedings in lieu of condemnation from the restrictions that the sale be a public auction. See North Dakota Enabling Act, Section 11. The question here, therefore, is whether Article IX, Section 6 of the North Dakota Constitution authorizes school and institutional lands to be acquired by some method other than public auction.

It is my opinion that the granting of a right of way across school and institutional lands is not a sale of lands within the meaning of the provisions of Article IX, Section 6 of the North Dakota Constitution. This has been the view of the courts of other jurisdictions construing similar provisions in other state constitutions. See, e.g. Idaho-Iowa Lateral and Reservoir Co. v. Fisher 151 P. 998, (Idaho 1915); Ross v. Trustees of University 222 P. 3 (Wyo. 1924). It was also the view adopted by the United States Supreme Court in a recent case in which the question, inter alia was whether a highway right of way could be granted over trust lands without public sale. Lassen v. Arizona Highway Department 385 U.S. 458 (1967).

In Lassen supra, the Court held that the restrictions of the New Mexico-Arizona Enabling Act requiring public sale were inapplicable to acquisitions of trust lands by the state for its highway program as long as the state compensated the trust for the the full value of any trust lands that were transferred from the trust to the state. Id. at 488. In reaching this conclusion the Court reasoned that:

. . . there would not often be others to bid for the . . . rights of way which the state might seek. More important, even if such bidders appeared and proved successful, nothing in the grant would prevent Arizona from thereafter condemning the land which it had failed to purchase; the anticipation of condemnation would leave the auction without any real significance. Id. at 464.

The same logic applies here. We cannot see that the trusts are in

any way jeopardized by allowing a right of way to be obtained by private sale if the provisions of N.D.C.C. chapter 15-09 are complied with. The numerous decisions of the courts of other jurisdictions as well as the holding of the United States Supreme Court in *Lassen supra*, clearly indicate an implied exemption from the general restrictions of public auction if procedures are utilized which guarantee that the trusts are compensated for the full appraised value of the disposed of interests.

III.

The final question is whether N.D.C.C. section 61-24.3-03 authorizes the State Water Commission to acquire a right of way without compensation over state lands which are not original school or institutional lands. Acquired lands are those lands which were not originally granted by the North Dakota Enabling Act as school or institutional lands but have since been acquired by the various school and institutional trusts.

As we have discussed above, N.D.C.C. chapter 15-09 governs the sale of school and institutional lands under the control of the Board of University and School Lands. As we noted in an earlier opinion, N.D.C.C. chapter 15-09 does not distinguish between "original grant lands" and "nongrant lands." 1966 N.D. Attorney General's Opinion 446. Our discussion above, therefore, applies equally to those lands acquired by the Board of University and School Lands on behalf of the trusts established by the Enabling Act and the Constitution of North Dakota.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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